

California League of Conservation Voters
California Trout
Pacific Coast Federation of Fishermen's Associations
Save San Francisco Bay Association
Sierra Club
The Bay Institute

July 18, 2000

Honorable Mary Nichols, Resources Secretary
Resources Agency
1416 9th Street
Sacramento, CA 95814

Honorable David Hayes, Deputy Secretary
U.S. Department of the Interior
1849 "C" Street, NW
Washington, DC 20240

RE: ESA Clarifications for the CALFED Framework

Dear Secretary Nichols and Deputy Secretary Hayes:

Thank you for taking the time recently to meet with environmental and fishing group representatives regarding "California's Water Future: A Framework For Action." The Framework is an important step forward. We appreciate the enormous leadership effort that this undertaking has required from you, and other members of the Policy Group.

This letter contains our joint recommendations clarifying the "assurances" aspect of the Framework and the forthcoming Record of Decision (ROD). We recognize and applaud the fact that the Framework establishes many of the commitments discussed below. Per your invitation, our recommendations are offered to eliminate ambiguity, clarify the issues and avoid future disputes to the extent possible. We share your interest in ensuring that the ROD establishes balance among the CALFED Program assurances and that all elements of the Program are realized together. These recommendations are consistent with the comments you received recently from our colleagues at Environmental Defense and NRDC.

Background: What Are Assurances?

CALFED has always been premised on the notion that the ROD will contain an "assurances package" providing the same level of security to all interests regarding anticipated CALFED benefits.

CALFED deserves enormous credit for developing an important and ambitious Ecosystem Restoration Program (ERP). But this Plan will not execute itself. Thus, for purposes of the Restoration Program, "assurance" means achieving the ERP's basic restoration targets. As we previously have discussed with you, the key environmental guarantees are: (1) firm funding for the ERP; (2) guaranteed water above the regulatory baseline sufficient to achieve the ERP objectives; (3) an agency with the mandate and tools to carry out and advocate for the ecosystem program within CALFED; and (4) maintaining legal remedies.

The assurances sought by the water user community are somewhat different: (1) a "no-surprises" cap on export reductions; (2) additional regulatory relief for construction of any new facilities; (3) promises of new water; and (4) control over ecosystem spending. In addition, any new facility is itself an assurance -- once a reservoir is built, it is virtually "assured" for all time.

Overview of Assurance Issues in the Framework

The Framework contains important commitments throughout regarding environmental water, funding, and user fees and we appreciate your effort in securing their inclusion in the document. However, the ROD cannot establish these commitments because they depend upon action by the state and federal legislatures. Thus, there is an inherent limit to what the ROD itself can promise to ensure the ERP is fully implemented. Conversely, the ROD (and/or related documents and agreements released with the ROD by the CALFED agencies) can provide key water user assurances -- ESA benefits, commitments to new water -- without further legislative action.

What the ROD (and those other documents) can do is clearly establish conditions linking CALFED Program benefits. The Framework indicates where these connections are intended but the language needs to be clarified and expanded in several areas.

To a large extent, the Framework is based on a hypothesis; that a considerable amount of new water can be pumped out of the environment without further harming fish or the ecosystem, and in fact allowing for a significant ecological restoration and recovery. We appreciate that the CALFED agencies have concluded that this can be accomplished within a safe margin. However, as we have discussed with you recently, our organizations still have significant concerns about this approach and agree with Deputy Secretary Hayes that it is basically "an experiment." The merits of the EWA as proposed and related issues are beyond the scope of this letter and we will submit separate comments on these topics.

Specific Language Recommendations¹

1. "No Surprises" Assurances

The Framework establishes a "no surprises"-style ESA assurance for Delta exporters that there will be no reductions in exports below current levels. (pp. 21-22, Appendix D.) It indicates that these ESA assurances are tied to the provision of the full amount of funding needed to achieve the recovery standard for the covered species: "The commitment will remain in effect conditioned upon assured funding and the availability of the assets upon which the commitment is based." (Appendix D.) The Framework also correctly recognizes that restoration of the adverse ecological impacts of Delta pumping on listed, and declining, species requires not only export limits, but also other flow and non-flow measures (ERP actions). ("[C]ommitments will be based on the availability of water from existing regulation, an [EWA] combined with the ERP,...")

We concur with the CALFED agencies that ESA assurances to Delta exporters must be tied to the provision of funding for the related ecosystem recovery effort.² However, as we recently discussed, this requires further clarification in the ROD. We recommend the following revision to the Framework Section currently titled "Environmental Water Account and ESA Commitments:"

[New Heading] Environmental Restoration and ESA Commitments

An essential goal of the CALFED Program is to provide increased water supply reliability to water users while at the same time assuring the availability of sufficient funding and water to meet... As a means to achieve this, the Program will provide commitments under the Federal and State Endangered Species Act for the first four years of Stage 1, conditioned upon provision of full funding, and the availability of environmental water, each year sufficient to fully achieve the Stage 1 objectives of the ERP. The ERP is an integrated restoration and recovery plan for the species listed, or in serious decline, and thus virtually all elements of the ERP, particularly in the early years, are tied to endangered species and critical habitat recovery.

¹ We understand the Framework is a final document but that it is serving as the basis for the ROD. Our recommendations here treat the Framework as a "draft ROD" and are intended for inclusion in the ROD rather than a revision of the Framework. Text in italics indicates ROD text based on the Framework. Bold italics text indicates our recommended revisions.

² We appreciate that CALFED regards the annual program review (pages 3-4) as an assurance for ERP funding. Our view is that this mechanism is likely to offer limited assurance for the ERP and could be a vehicle for politicizing the restoration funding.

The environmental water which will serve as the basis for the ESA commitments to delta exporters will include three tiers; (1) the availability of water from the existing regulatory baseline; (2) an environmental water account (EWA) combined with the ERP (flows and non-flow measures), and (3) the ability to obtain additional assets should they be necessary. It is hoped that the EWA will benefit water users by providing additional water for fish without the need to reduce project deliveries. The EWA will be funded jointly by the State and Federal governments and user fees. The State and Federal fishery agencies (FWS, NMFS, CDFG) will manage and administer the EWA, in coordination with the federal and state water project operators. They will consult with other interested parties through the CALFED Operations Group. The EWA managers (FWS, NMFS and CDFG) will be authorized to acquire, bank, transfer and borrow water and arrange for the conveyance of EWA assets. Initial acquisition of assets ...

To provide stability and reliability to the environment and to water users during the initial period of Stage 1, the CALFED agencies will provide a commitment, subject to legal requirements, that for the first four years of Stage 1, there will be no reductions, beyond existing statutory and regulatory levels, in CVP and SWP Delta exports resulting from measures to protect species under the Federal and State Endangered Species Act. This commitment will be conditioned upon the provision of full funding for the ERP and the availability of the three tiers of environmental water assets.³ Tier 1 is baseline water ...

2. Extension of ESA Assurances

The Framework states that it is anticipated that the ESA assurances will be extended subject to an evaluation of how well the CALFED Program is performing for fish and wildlife and a revised Biological Opinion. We concur with the CALFED agencies that any extension should be subject to scrutiny and evaluation to determine how well the EWA is performing and how well the Restoration Program is being implemented. To avoid any confusion that CALFED will merely roll over the ESA assurances at the end of the four year period, the ROD should contain a clear sunset provision for the ESA assurances with an extension conditioned on completion of the review and evaluation of the Program as set forth in Appendix D.

In order to maintain balance in the Program and provide a high degree of confidence in the science underlying a decision to extend the ESA assurances, we recommend that a panel of independent scientists review the first four years of the Program's implementation and provide decision makers with their evaluation of whether extended ESA assurances are appropriate. This would provide a parallel to the independent

³ *To the extent that any particular restoration project is entirely unrelated to the recovery of species protected by the ESA or CESA, the appropriate agencies may consider whether failure to fund such a project should have an effect on the ESA assurances.*

scientist review regarding the Tier 3 water. We propose the following revision to page 22, last paragraph:

The ESA commitment will be in effect for four years based on the funding and environmental water assets available in that period. The CALFED agencies anticipate that sufficient assets..., will be available for the protection of fish beyond the first four years. If this proves to be the case, the commitment will be extended. The ESA commitment will end four years from the date of the biological opinion in which they are contained, but can be extended if two conditions are fulfilled: (1) The Services must complete the revision to the biological opinion discussed in Appendix D; and (2) an independent panel of scientists must complete a separate evaluation of the performance of the Program over the first four years and assess the adequacy of the financial and water assets available to provide for the protection and recovery of the fish. This panel will not include experts connected to any of the partisan interests in this matter and should include, to the greatest extent possible, people with experience in managing large ESA and/or ecosystem recovery plans in other areas. Both panels will be directed to complete their work no later than 90 days prior to the end of the initial four-year commitment period as set forth in Appendix D.

3. Relationship Between EWA and ERP Funding

The Framework contains contradictory statements about whether CALFED is proposing to use ERP funding for the EWA or whether the \$50 million annual funding proposed for the EWA is in addition to the \$1 billion for the ERP itself:

- "In Stage 1, CALFED will invest over \$1 billion in ERP projects,..., in addition to funds necessary for the Environmental Water Account." (Page 5)
- The ERP "must have at least \$150 million from dedicated funding sources annually through Stage 1, including up to \$50 million annually for the EWA for each of the first four years." (Page 5)

We recommend the following revision to the third paragraph on page 5 to make it consistent with the preceding paragraph which we understand to be CALFED's intent:

To be successfully implemented, the Ecosystem Restoration Program must have at least \$150 million annually through Stage 1. Additional funding of up to \$50 million will be available for the EWA for each of the first four years. To the extent the full \$50 million for the EWA is not spent in any of these years, this funding can be redirected to the ERP. Some elements of the ERP...

4. "Borrowing"

The Framework references "borrowing" but does not discuss the extent to which the fishery agencies are relying on this mechanism to provide it with access to environmental water. The Biological Opinion and the ROD should clarify that the ESA assurances for

Delta exporters are conditioned upon not only the funding and water discussed above, but are further conditioned upon finalization of the three types of borrowing agreements committed to in the Framework's Appendix C.

5. New Water For Contractors

In addition to the regulatory relief issues discussed above, and permit streamlining for various new facilities, the Framework appears to promise new water for the water users in two places. It states that water for south of Delta contractors will increase by 15% of contract totals or more in normal years to get the contractors to 65-70% of their contract totals. In addition, the document states that although the Trinity Decision is separate from the CALFED ROD, the agencies "intend" that the Trinity Decision will not affect the current level of deliveries or the 15% increase in delivery target. From an assurance perspective, these statements raise two concerns.

First, the nature and relationship of these provisions is unclear. Is CALFED proposing to make up to contractors any loss of CVP water incurred by the separate Trinity Decision? If so, are these additive commitments? Second, it is not clear how these provisions relate to assurances that the ERP will be fully implemented. The ROD should address these issues and ensure that any commitments of new water to consumptive use is balanced by related assurances to the Ecosystem Restoration Program.

Thank you for your attention to these recommendations. We look forward to working with you as CALFED proceeds toward the Record of Decision.

Sincerely,

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